IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

CINGULAR PENNSYLVANIA, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 05A-12-003-RFS
	)	
SUSSEX COUNTY BOARD OF ADJUSTMENT,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Upon an Appeal of the Sussex County Board of Adjustment. Affirmed.

Submitted: September 26, 2006
Decided: January 19, 2007

Pamela J. Scott, Esquire, Saul Ewing, Wilmington, Delaware, Attorney for Plaintiff.

Richard E. Berl, Jr., Esquire, Smith O'Donnell Feinberg & Berl LLP, Georgetown, Delaware, Attorney for Defendant.

STOKES, Judge

Cingular Wireless (hereinafter "Cingular") now appeals the Sussex County Board of Adjustment's (hereinafter "Board") denial of a special use exception. For the reasons set forth herein, the decision of the Sussex County Board of Adjustment is affirmed.

STATEMENT OF FACTS

Cingular sought a special use exception for the purpose of erecting a 150 foot telecommunications monopole (hereinafter "Tower"). The site for the proposed Tower (hereinafter "Property") was a thirteen acre parcel of land zoned AR-1 (Agricultural/Residential), located on the west side of the intersection of Road 363 and Road 365, near Ocean View, Delaware. The Tower was to be placed in a sixty-by-sixty foot compound, surrounded by a six foot high fence.

On June 20, 2005, a public hearing was held on Cingular's application. Cingular claimed that the Tower was necessary to provide coverage for a gap in the area network. Cingular also presented testimony and other evidence that it would: (1) maintain the statutorily-required setbacks, (2) design the Tower so that it would accommodate at least two additional "PCS/cellular platforms," and (3) place warning lights every fifty feet as required by code. Furthermore, Cingular offered testimony that no other suitable location exists within two miles of the Property where co-location would be possible.[1]

At the close of Cingular's case-in-chief, a number of individuals from the area surrounding the Property testified in opposition to the Tower. The testimony addressed

[1] Another large communication tower is in existence in the general vicinity of the proposed Tower. That tower, however, cannot structurally support the antennas needed to extend Cingular's coverage area.

concerns for the potential health hazards created by radio frequency emissions, the possible negative effect the proposed structure would have on traffic safety, and the possible effect the Tower would have on property values.[2] A number of individuals also opposed the Tower on aesthetic grounds. More specifically, one individual questioned the effect that the monopole would have on the quality of the area since, as she stated, Bayard Road is presently shown on Delaware maps as a "scenic back trail." Application of Cingular Pennsylvania, LLC Transcript of June 20, 2005 (hereinafter "Transcript"), at 35.

The opposition submitted exhibits showing that the subject Property is "low density" under the current Sussex County Comprehensive Plan (hereinafter "Plan"). The Plan calls for the protection of agricultural lands "… from the depreciating effect of objectionable, hazardous and unsightly uses." Sussex County Comprehensive Plan, at 28 (Jan. 1, 2003).[3]

At the conclusion of the testimony offered by the opposition, the Board gave Cingular the opportunity for rebuttal. Cingular used this chance to present a report from Millennium Engineering, P.C., dated March 30, 2005 (hereinafter "Health Study"), challenging the public's notion that the Tower would create a safety hazard. The Health Study represented an independent determination and certification that the Tower will comply with the Federal Communications Commission's (hereinafter "FCC") "exposure limits and guidelines …

[2] Pat Worthen, a community member expressing concern over the Tower's effect on property values, has a professional background in the real estate field. *See* Transcript at 36, l. 21 ("I'm a real estate agent ….").
[3] a*vailable at* http://www.sussexcountyde.gov/departments/countycouncil/CompleteCompPlan.pdf.

governing human exposure to radio frequency electromagnetic fields." *See* Ex. C of Pls.' Opening Br. on Appeal.

During the rebuttal, Cingular also presented two studies relating to the effect towers have on real estate values.[4] One of the studies, dated May 2, 2001, was done in an area located in Potomac, Montgomery County, Maryland, with the results of the study "suggest[ing] that market activity related to home sales is not negatively impacted by proximity to, or visibility of, [a local] monopole." *Id.* The other study, dated "March/April 1999," was conducted in Richmond, Virginia, and found "that there was no consistent market evidence suggesting any negative impact upon improved residential properties exposed to such facilities in the area included in the study." *Id.*

At the close of discussions, the Board expressed its own concern over the length of the setbacks required by the Sussex County Zoning Code. The Board decided that the best course of action would be to table the case, leaving the record open, in order to allow Cingular to confer with the Property owner as to whether or not the owner would make provisions for a site further from the road.

Cingular responded to the Board's request by letter dated July 8, 2005. The letter informed the Board that the Property owner was not willing to change the location of the proposed Tower. Cingular's letter also included some discussion of the previously

[4] One study is titled "Monopole Impact Study on Residential Real Estate Prices for Homes and Residential Lots in the Vicinity of the Bullis School in Potomac, Montgomery County, Maryland," prepared by Thorne Consultants, Inc., on May 2, 2001. The other is titled "The Impact of Communication Towers on Residential Property Values," prepared by Allen G. Dorin, Jr., MAI, SRA and Joseph W. Smith, III.

mentioned traffic safety issues. Cingular sought to further address those concerns by submitting a traffic study[5] (hereinafter "Drive Study") designed to assess the visual impact of the proposed Tower on persons driving by the intersection of Bayard Road and Double Bridges Road. *Id*. The Drive Study concluded the following: "[b]ased on a review of the photographs, the proposed tower base does not appear to cause any adverse visual impact." *Id*.

The Board later denied the application, making the following findings of fact:

1. The Applicant wishes to place a 150 foot communications tower on a parcel of roughly 13 acres zoned AR-1.
2. The Applicant proposes to place the tower within a 60 foot by 60 foot fenced in area, with a fence being 6 feet tall. A 12 foot by 20 foot equipment shelter will be included.
3. The tower application meets the technical requirements of the ordinance. According to the Applicant, there are no other locations to co-locate the antenna in the area, and the proposed location was intended to allow the owner of the property to maintain reasonable use of the property.
4. The tower will be setback 80 [sic] feet – 30 [sic] feet more than the minimum required under the ordinance.
5. The Applicant addressed an older tower in the general vicinity, which is not structurally sound enough to support the new hardware, and which is scheduled to be "decommissioned", or removed.
6. Numerous individuals testified in opposition to the tower location. Dave Just believed the tower would have an adverse effect on the neighborhood, and that the proposed location is at a very dangerous intersection, which has been the site of numerous traffic accidents. He expressed concern about safety issues, noting that the fenced in compound area might block oncoming traffic.
7. Bill Gaines, a local real estate agent, also testified that the proposed tower might adversely affect property values. He added that individuals were attracted to this area and moved to this area for its "country setting" and that a cellular tower would have an adverse visual impact on that setting.

[5] Driving Study for the Sussex County Board of Adjustments Case No. 9101, compiled by AMEC Earth & Environmental, Inc. (June 24, 2005).

8. Kevin Brennan, a resident of the area for approximately 40 years, objected to the tower being placed in an area that would likely soon be home to more individuals. In response to Board questions inquiring as to whether or not the tower could be moved back further from the road, Mr. Brennan noted that doing so would place the tower even closer to his own property.
9. Sarah Druckenmiller also expressed concern with the impact of the tower on property values and the safety hazards of locating the tower at a dangerous intersection.
10. Sally Ford, a 23 year resident of the area, enjoys the peace and quiet of the area, and the clear sky which allows her to utilize her telescope. She believes lights from the tower will interfere with the view, and she also expressed concern that the road is part of a scenic bike [sic] trail. Mrs. Ford's husband also testified in opposition, suggesting that the tower should be placed further back on the property and away from the road. He noted that the area was strictly residential, and was not suitable for a communication tower.
11. Mark McLaughlin, a 30 year resident, recently constructed an addition to his dwelling, and objected to the fact that the view from the new addition would be of the cellular tower. He characterized the neighborhood as "pristine", believing the new tower to be something of an eyesore, and similarly creating a driving hazard.
12. Pat Worthen, a real estate agent, opposed the Application and the fact that it would be noticeable from her front porch.
13. In rebuttal, the Applicant submitted copies of a health study prepared for the Federal Communications Commission, and which revealed that communications towers would not create health problems. The Applicant also provided a study in support of the proposition that cellular towers do not adversely affect property values. It was noted, however, that the study was prepared in connection with property in Montgomery County, Maryland, and not for the site of the current application. The Applicant also pointed out the Board should not restrict towers to commercial properties since the current ordinance permits them to be set in residential areas, and since the Applicant's task of eliminating gaps in coverage could not be met if it were so restricted. The Applicant also pointed out that the towers are monitored 24 hours per day seven days a week by a management firm hired to maintain the site.
14. The hearing was originally tabled, but with the record left open in order to allow for the Applicant to confer with the property owner as to whether or not the owner would make provision for a site further from the road. Subsequently, the Board received information that the owner would not agree to the tower being located elsewhere on his property.

15. *The board determined that the Application did not meet the requirements for a special use exception in that the proposed location would create a significant safety concern, and that the Application would otherwise adversely affect the values and uses of other properties in the community.*

Ex. B of Pls.' Opening Br. on Appeal (emphasis added).[6]

STANDARD OF REVIEW

The Delaware Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing court is to determine whether "substantial evidence" exists on the record to support a zoning board's findings of fact and to correct any errors of law. *Hellings v. City of Lewes Bd. of Adjustment*, 1999 Del. LEXIS 235, at *4 (Del. July 19, 1999); *In re Beattie*, 180 A.2d 741, 744 (Del. Super. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Holowka v. New Castle County Bd. of Adjustment,* 2003 Del. Super. LEXIS 161, at *11 (Del. Super. Apr. 15, 2003); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986). Substantial evidence is "more than a scintilla, but less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[6] The Court makes note, *sua sponte*, that the transcript from the October 19, 2005 Board hearing indicates that one of the voting Board members (assumed to be Mr. Mills based on his previous statements) voted in favor of Cingular's application. The Decision of the Board, however, states the following: "[t]he Board members voting in favor of the denial were: Mr. Callaway, Mr. Mills, Mr. Workman and Mr. Hudson; voting against – none, and with Mr. McCabe abstaining." Nonetheless, the Court proceeds on the understanding that the Board acted with a quorum and that the vote taken constituted the requisite number needed for the Board to act.

"[T]he Court gives great deference to the Board, requiring only 'evidence from which an agency could fairly and reasonably reach the conclusion that it did.'" *Dempsey v. New Castle County Bd. of Adjustment*, 2002 Del. Super. LEXIS 312, at *9 (Del. Super. Apr. 17, 2002). The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings. *Holowka*, 2003 Del. Super. LEXIS 161, at *11. The appellate court merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d). Application of this standard requires the reviewing court to consider the entire record, to determine whether, on the basis of all the testimony and exhibits before the agency, it fairly and reasonably could have reached the conclusion it did. *Holowka*, 2003 Del. Super. LEXIS 161, at *14. "The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable." *Mellow v. New Castle County Bd. of Adjustment*, 565 A.2d 947, 955 (Del. Super. 1988). If the Board's decision is "fairly debatable" then there has been no abuse of discretion. *Id.*

DISCUSSION

I. ADEQUACY OF RECORD

It is well-established that, when making a decision, the "Board must particularize its findings of fact and conclusions of law to enable the Superior Court to perform its function of appellate review." *Mesa Communs. Group, L.L.C. v. Kent County Bd. of Adjustment*, 2000 Del. Super. LEXIS 417, at *9-10 (Del. Super. Oct. 31, 2000). If the record is deficient

then the appellate court cannot properly perform its duty and must reverse the board of adjustment's decision. *See Brittingham v. Bd. of Adjustment of Rehoboth Beach*, 2005 Del. Super. LEXIS 18, at *42 (Del. Super. Jan. 14, 2005) ("In Delaware, … in cases involving Boards of Adjustment, a superior court does not have the freedom to remand the case in order to allow the Board to hold further hearings, to make specific fact findings or to reconstruct the record. Reversal would be the court's only option.")

The Board's Decision contains sufficient information for appellate review. Contained in the Decision is a finding that the "tower applicant meets the technical requirements of the ordinance." Ex. B of Pls.' Opening Br. on Appeal. The parties have similarly agreed and the record cannot be found deficient on this point.

The Decision continues with some discussion of the testimony offered by those opposed to the Tower. This discussion establishes a foundation for the Board's determination that the Tower would have a substantial adverse effect on neighboring property owners. The Decision addresses the specific issues raised at the hearing and the law applicable to those issues. The information contained in the Decision itself is sufficient for the Court to perform its appellate role.

Furthermore, the record provided to the Court includes more than simply the Decision itself. The Transcript is appropriately considered as part of the record on appellate review. Despite the presence of inaudible passages, the Transcript provides a comprehensive record of the matters presented to the Board.

Certain items were present in the Transcript but absent from the Decision. Those items include Cingular's Traffic Study and the Richmond Virginia property value report. The absence of these items in the Decision is not, however, fatal to the Board's ultimate holding. The nonappearance of the items in the Decision evidences a determination by the Board that the information was either not appropriate for consideration or not credible evidence.

It is outside the role of this Court to reweigh the evidence or substitute its own judgment for that of the Board. The relevant question remains limited to whether there is substantial evidence in the record to support the Board's findings. The record presented to this Court provides enough information for meaningful review and thus the Board will not be reversed based on any alleged inadequacies in the record.

II. SUBSTANTIAL EVIDENCE

The Sussex County Zoning Code (hereinafter "Code") lays out the requirements for constructing a freestanding commercial communications monopole in a residential district. Those requirements include: (1) a minimum lot size of one acre, (2) the granting of a special use exception, (3) a showing of need for such a tower at the proposed location, (4) proof of a lack of existing structures within a two-mile radius on which collocation would be possible, (5) a design adequate to support at least two additional PCS/cellular platforms, (6) set backs at least one-third the height of the tower, (7) a minimum six foot tall fence, and (8) warning lights, placed every fifty feet of elevation. Sussex County Code, § 115-194.2. Special use

exceptions, as required by section 115-194.2 of the Code, are granted only "if the Board finds that, in its opinion, as a matter of fact, such exceptions will not substantially affect adversely the uses of adjacent and neighboring property." *Sussex County Code*, § 115-210; *see also*, *Cingular Wireless v. Sussex County Bd. of Adjustment*, 2006 Del. Super. LEXIS 48, at *10 (Del. Super. Feb. 10, 2006). "The burden of demonstrating that the proposed use will not affect neighboring properties must be carried by the special use exception applicant." *Cingular Wireless*, 2006 Del. Super. LEXIS 48, at *10.

The parties have agreed that Cingular has met the technical requirements of section 115-194.2. The parties do not, however, agree that Cingular has met its burden with relation to the standard for obtaining a special use exception. Special use exceptions require fact specific inquiries by the Board. The role of the Court, when reviewing the factual findings of an agency, is to "search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably [have] reach[ed] the conclusion that it did." *Holowka*, 2003 Del. Super. LEXIS 161, at *14 (quoting *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980).

(a) Health Study

Included in the evidence the Board considered is the Health Study Cingular submitted. The Health Study shows that the proposed Tower complies with FCC regulations concerning radio frequency emissions. The Board properly considered the study, but it cannot be a basis for the Board's denial of Cingular's request. Congress enacted the Telecommunications Act

to aid in the construction of communication facilities. *See* 47 USC §§ 301 et seq. The Telecommunications Act preempts the state's right to regulate the environmental effects of radio frequency emissions where the facilities would operate within FCC guidelines. 47 USC § 322(c)(7)(B)(iv); *see also, Preston v. Bd. of Adjustment*, 2002 Del. Super. LEXIS 112, at *8-9 (Del. Super. Jan. 23, 2002). Cingular's proposed Tower would operate within FCC guidelines; therefore, the Board is not free to deny the special use exception on that basis and did not do so.

(b) Traffic Safety

Another point brought to the Board's attention was the potential safety hazard that could be created by placing the Tower in close proximity to an allegedly dangerous curve in the road. The placement of the Tower, in relation to traffic safety, has the potential to substantially affect adversely the uses of adjacent and neighboring properties. The burden is placed on the applicant to show that the proposed structure would not in fact yield such an adverse effect. *See Cingular Wireless*, 2006 Del. Super. LEXIS 48, at *10. Furthermore, the applicant bears the burden of rebutting any testimony or evidence illustrating that an adverse impact would exist from the proposed structure.

In order to make the required evidentiary showing, Cingular presented the Board with an independently conducted Drive Study.[7] The Study, however, could not appropriately be

[7] The Drive Study found that the presence of a structure, similar only in size to the base of the proposed Tower, did not have a negative affect on traffic conditions. *See* Ex. C. of Pl.'s Opening Br. on Appeal.

considered as part of the record.[8] It was known to Cingular that the proposed site for the Tower was near an allegedly dangerous curve. *See* Ex. 15 of Return on Appeal (Outline of Key Points against Cingular, prepared by D. Just, lists location on an "already dangerous corner" as point of discussion). However, Cingular made no attempt to address the traffic safety issue at the hearing on June 20, 2005. It was only after the Board requested specific information on the possibility of placing the Tower further from the road that Cingular attempted to cure the deficiency in the evidence it had presented. The Board's request did not invite such a submission. It was limited exclusively to whether or not the property owner would agree to alter the placement of the Tower. Cingular's submission was an unacceptable attempt to bolster its case.[9]

An applicant for a special use exception bears the burden of presenting evidence in a manner that is "susceptible of cross-examination and rebuttal by opponents and of appellate review by the courts." *Rollins Broadcasting of Delaware, Inc. v. Hollingsworth*, 248 A.2d 143, 145 (Del. 1968). *Ex post facto* attempts to present evidence outside of the public hearing challenge those fundamental principles. Furthermore, the "voice of the community is an important element to public hearings." *Bethany Beach Volunteer Fire Co. v. Bd. of*

[8] Paragraph 12 of the Board's Return on Appeal states the "Drive Study for case # 9101" was considered as part of the record. This comment appears to be a clerical error. The Transcript does not show record evidence of the Drive Study being considered by the Board, nor does the Decision itself evidence such consideration.

[9] It was noted in paragraph 31 of the Board's Return on Appeal that "a letter from Sally Ford dated July 6, 2005, was not considered by the Board since it arrived after the public hearing was closed." For all intents and purposes the hearing was closed on the issue of traffic safety at the time Cingular submitted the Drive Study. The two submissions would be similarly situated and must be treated in the same way. Neither the letter from Sally Ford nor the Drive Study were appropriate considerations for the Board in makings its determination.

Adjustment of Bethany Beach, 1998 Del. Super. LEXIS 330, at *6 (Del. Super. Sept. 18, 1998). An offer of evidence outside of the public hearing compromises the community's ability to challenge a party's zoning application. *See Beatty v. New Castle County Bd. of Adjustment*, 2000 Del. Super. LEXIS 235, at *18 (Del. Super. May 23, 2000) ("It is extremely important that the community's participation in this process be meaningful with a full opportunity to be heard."). Cingular's delayed submission of the Drive Study was inappropriate, and the Board could not have considered the Study.

Additionally, even if the Drive Study were to have become part of the record, the Board would have been free to disregard it and accept instead the testimony and evidence submitted by those in opposition of the Tower.[10] *Id.* at *16 (finding that the Board's ruling need not be based solely on expert testimony), *see also*, *Hersh v. Zoning Hearing Bd.*, 493 A.2d 807, 810 (Pa. Commw. Ct. 1985) ("The Board, as fact finder, has the power to reject even uncontradicted [expert] testimony if the Board finds that testimony to be lacking in credibility."), *see also*, *Kaeser v. Conservation Com. Of Easton*, 567 A.2d 383, 386 (Conn. App. 1989) (The court found that nonexperts may offer reliable and substantial evidence. Furthermore, "an administrative agency is not required to believe any witness, even an expert."). The testimony offered by the opposition[11] could be recognized by the Board

[10] Absent any opposing testimony it is still problematical to determine whether the Board would have been persuaded by the findings of the Drive Study. The reason for this is that the mock-up used in the Study only represented the base of the monopole and not the actual 150 foot illuminated Tower that was proposed. The difference in the distractive effect of the two structures might be substantial.

[11] Tr. at 23, ll. 19-21 ("Last year, my wife and I returned home to find a young girl literally flipped her car over negotiating this turn")

because it was particularized to actual experiences at the proposed location.[12] *See Tauber v. County Bd. of Appeals*, 262 A.2d 513 (Md. 1970) (affirming board's decision; concluding that actual experiences of community members were sufficient to qualify traffic problem as a present concern rather than a potential one), *see also, Mack v. Municipal Officers of Cape Elizabeth*, 463 A.2d 717, 720 (Me. 1983) (The Court found that the Board was free to accept the testimony of neighbors over that of an expert. "Although the Board could not have validly based its decision against the Macks solely upon its 'visceral' reaction to the project, it was not compelled to accept the conclusions of the Macks' experts." (citation omitted)). The opposition's testimony reinforces the position that this intersection is dangerous.

Furthermore, the Board can acknowledge the opposition's position because no expert testimony is required on matters within common experience. *See Brandt v. Rokeby Realty Co.*, 2004 Del. Super. LEXIS 297, at *13 (Del. Super. Sept. 8, 2004), *see also, Ward v. Shoney's, Inc.*, 817 A.2d 799, 803 (Del. 2003) (finding the fact that people cut corners to be a matter of common knowledge, not requiring expert testimony), *see also*, *Seiler v. Levitz Furniture Co. of Eastern Region, Inc.*, 367 A.2d 999, 1008 (Del. 1976) (concluding that defendant's mistake was so apparent that plaintiff was not obliged to produce expert

[12] In *Gibson v. Sussex County Council*, the Delaware Chancery Court found that community members opposed to the project did not "substantiate their generalized concerns with specific evidence about the threat posed by the Project." 877 A.2d 54, 78-79 (Del. Ch. 2005). As a result, the Court found that the community had provided "no neutral, non-arbitrary basis for the Council to deny the Gibsons' application." *Id.* It was, however, recognized by the Court that "community opposition may, in other circumstances, provide sufficient justification, especially where the objection rationally relates to public health, safety or welfare and has evidentiary support." *Id.* at 79 n.85. The testimony offered by those opposed to Cingular's application was particularized to the proposed location and related specifically to public safety. The concerns were not of a generalized nature. The lay and eye witness testimony offered in this case provided the Board with a neutral, non-arbitrary basis for denying Cingular's application.

testimony at trial to establish the bench mark by which his standard of care was measured). It is within general knowledge that driving on curves is dangerous, and that a 150 foot tower placed eighty-five feet from the road and illuminated at fifty foot intervals may turn a head. Jurors in negligence cases often make similar determinations about dangerous conditions using their common sense and knowledge. There is sufficient evidence in the record to support the Board's determination that the Tower could affect, both substantially and adversely, the neighboring properties.

(c) Property Values

Without undue repetition, "[t]he burden of demonstrating that [a] proposed use will not affect neighboring properties must be carried by the special use exception applicant." *Cingular Wireless*, 2006 Del. Super. LEXIS 48, at *10. If a Board denies the proposed use, and the matter is appealed, the party seeking to overturn the Board's decision bears the burden of showing that the decision was arbitrary and unreasonable. *Mellow v. New Castle County Bd. of Adjustment*, 565 A.2d 947, 955 (Del. Super. 1988). If the Board's decision is "fairly debatable" then there has been no abuse of discretion. *Id.*

Cingular failed to meet its burden with relation to the effect the proposed Tower would have on neighboring property values. Cingular offered into evidence a real estate study conducted in Potomac, Maryland, dated May 2, 2001, and a real estate study done in Richmond, Virginia, dated "March/April 1999." The Board did not find these studies to be persuasive and had no other credible evidence to rely upon in Cingular's favor.

Cingular was not limited to the studies it provided as the only means of illustrating the effect the Tower may have on property values. Cingular was free to hire an independent expert and to have that expert specifically address the probable effect of *this* Tower. Cingular relied upon two out-of-state and outdated studies which were not substantially similar to the proposed area in question. Therefore, the Board could discount their value and find that Cingular did not meet its burden of showing that the Tower would not substantially affect adversely the use of adjacent and neighboring properties.

In addition, the testimony offered by those in opposition to the Tower, suggesting a negative effect on property values, supports the Board's denial of Cingular's application. *See* Tr. at 34, ll. 12-13 ("I agree it's going to [] affect the land values …."), *see also*, Tr. at 22, ll. 17-18 ("[T]he location of a cell tower would detrimentally affect our real estate values …."), *see also*, Tr. at 25, ll. 3-6 ("I think a 60-by-60 chain-link fence and 150-foot tower would affect the values of properties and also potential buyers in that area."). The Board can accept testimony of this nature because "an owner of real property, by reason of that ownership, is presumed to have special knowledge as to its value and is therefore competent to testify in that respect." 31A Am. Jur. 2d *Expert and Opinion Evidence* § 307 (2006), *see also*, *Cronin v. Board of Assessment Review*, 1992 Del. Super. LEXIS 562, at *5 (Del. Super. Feb. 26, 1992) ("Delaware law permits a property owner to give his opinion as to the value of his real estate."), *see also*, *Projector v. Bd. of Adjustment of Sussex County*, 1986 Del. Super. LEXIS 1349 (Del. Super. Sept. 26, 1986) (overruling board's grant of special use

exception where applicant did not present substantial evidence and opposition offered testimony regarding adverse impact on property values). The testimony of neighboring land owners supports the Board's decision.[13]

The burden to show that the proposed structure would not substantially affect adversely the use of adjacent and neighboring properties rested on Cingular at all times. This remained the case regardless of whether or not any opposing testimony was offered. Cingular, to its own detriment, chose to address the effect the Tower may have on property values through particular evidence. A reasonable fact finder could find it had slight probative value at best. Consequently, the Board, finding Cingular's property value studies to be unpersuasive, was left with no reliable factual basis to rule in Cingular's favor. The voices of the community merely corroborate the Board's conclusion.

The foregoing circumstances provide adequate support for the Board's decision. Therefore, the Court need go no further into a discussion of arguments based on the Sussex County Comprehensive Plan or aesthetics. Whatever else might be said, the Board's decision is, at a minimum, "fairly debatable", and, for this reason alone, the Board has not abused its discretion in denying Cingular's application.

[13] Additional credibility can be given to the testimony of Pat Worthen due to her professional background in the real estate field. The nature of Ms. Worthen's concern is discernable, notwithstanding inaudible parts of the Transcript.

CONCLUSION

Considering the foregoing, the Sussex County Board of Adjustment's denial of Cingular Wireless' requested special use exception is affirmed.

IT IS SO ORDERED

cc: Prothonotary